

Andrew J. Kahn AZ. Bar # 15835
Elizabeth A. Lawrence AZ Bar #201537
DAVIS COWELL & BOWE LLP
2401 North Central Avenue, 2nd Floor
Phoenix, AZ 85004
Telephone: 800-622-0641
Facsimile: 602-251-0459
E-mail: ajk@dcbsf.com
*Attorneys for Plaintiffs UFCW Local 99,
McLaughlin and Colbath*

Gerald Barrett, AZ Bar #005855
WARD KEENAN & BARRETT, PC
3838 N Central Ave., Suite 1720
Phoenix, AZ 85012
Telephone: 602-279-1717
Facsimile: 602-279-8908
E-mail: gbarrett@wardkeenabarrett.com
*Attorneys for Plaintiffs UA Local 469, McNally
& Rothans*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

UNITED FOOD & COMMERCIAL
WORKERS LOCAL 99, et al.,

Plaintiffs,

vs.

JAN BREWER, in her capacity as
Governor of the State of Arizona; et. al.,

Defendants.

CASE NO. CV11-0921 PHX-GMS

DEPT: XX

**PLAINTIFFS' OPPOSITION TO
STATE DEFENDANTS' MOTION TO
DISMISS**

1 **I. INTRODUCTION AND SUMMARY**

2 The state officials who are defendants moved to dismiss this action arguing
3 primarily that Plaintiffs' claims are not ripe because these defendants have not expressly
4 threatened to enforce SB 1363 and SB 1365 against Plaintiffs. The key problem with this
5 argument is that Plaintiffs' FAC pled these new laws are already having effects on their
6 conduct and speech by changing how they operate so they can avoid any prosecution.
7 These laws are also impairing their bargaining power with employers in current and
8 upcoming bargaining agreement. Plaintiffs' fears of arrest or other prosecution are not
9 idle because they allege they are active in engaging in group speech in front of
10 workplaces, in speaking critically of employers in ways which have drawn claims of
11 falsity in the past, and in using some dues deducted from paychecks for politics.

12 SB 1363 makes sweeping changes to Arizona law which put into doubt the
13 legality of Plaintiffs' current picketing and organizing practices, thus impacting their
14 conduct due to fear of prosecution. SB 1363 creates criminal liability for defamation of
15 employers (as newly-defined) and for "unlawful mass assembly" (including any assembly
16 in an "unreasonable" manner). It defines these and other offenses as forms of "workplace
17 harassment" for which injunctions can issue without notice under a lower-than-normal
18 evidentiary burden, and enlists law enforcement officers in enforcing such injunctions. It
19 broadens the definition of "defamation" to encompass negligent falsity (contrary to U.S.
20 Supreme Court precedent).

21 SB 1365 makes sweeping changes to Arizona law which burden Plaintiffs' ability
22 to collect voluntary dues from their members: it would now be illegal for an "employer to
23 deduct payment for political purposes unless the employee annually provides written or
24 electronic authorization to the employer for the deduction." A.R.S. 23-361.02. Requiring
25 unions to collect employee signatures for this purpose on an annual basis is imposing a
26 substantial logistical and financial burden, one already occurring because of the need to
27 create systems now to handle the law's upcoming October 1st effective date. SB 1365
28 also burdens unions by forcing them to provide employers with a "statement that

1 indicates the maximum percentage of payment that is used for political purposes.” If
 2 Plaintiffs submit an inaccurate statement, the law imposes a \$10,000 penalty. Thus,
 3 Plaintiffs have to work now on determining with greater exactitude what they and their
 4 parent Internationals are likely to spend.

5 The ripeness inquiry here is greatly impacted by the fact both laws violate
 6 Plaintiffs’ constitutional rights as to speech and assembly. Under settled law, a suit over
 7 violations of speech rights is ripe when a plaintiff reasonably censors himself rather than
 8 face prosecution. Plaintiffs allege they are doing this in the FAC. For example, SB 1365
 9 is causing Plaintiffs to censor themselves because Plaintiffs have “spent and absent SB
 10 1365 plan[] to continue to expend union treasury funds for ‘political purposes’ as that
 11 term is defined in SB 1365.” FAC ¶ 18. Plaintiffs’ FAC alleges the threat of prosecution
 12 under SB 1363 “is deterring Plaintiffs . . . from engaging in a significant amount of
 13 [union] activities.” FAC ¶ 112. As a result, Defendants’ motion to dismiss lacks merit.

14 However, if somehow there is insufficient detail in the FAC, Plaintiffs are entitled
 15 to leave to amend. Plaintiffs could amend the FAC to spell out in greater detail the
 16 regularity of their past and current speech and assembly which would subject them to
 17 arrest, including conduct at State facilities and State roadways which the State (the
 18 Governor and AG) can pursue as an “employer” under SB 1463 or in the AG’s
 19 prosecutorial capacity.

20 **II. STATEMENT OF FACTS**

21 The Plaintiffs are United Food & Commercial Workers Local 99 (“UFCW”), UA
 22 Plumbers and Steamfitters Local 469, and the top officer and an active member in each.
 23 Local 99 has 18,000 members and organizes in several different industries, having
 24 members not only in the food industry, but also museum technicians, legal aid attorneys,
 25 parking lot cashiers, and janitors. See www.ufcw99.org. Defendants are members of
 26 Arizona’s executive branch responsible for enforcing SB 1363 and SB 1365. Defendant
 27 Brewer is Governor and “responsible for carrying out the laws enacted by the Legislature,
 28 including enforcement of SB 1363 through the Department of Public Safety and

1 overseeing the Labor Department of the Industrial Commission which is responsible for
 2 enforcing some of the provisions of SB 1363 and SB 1365.” FAC ¶11. Defendant Horne
 3 is Arizona Attorney General and the State’s chief legal officer responsible under SB 1365
 4 for adopting regulations and enforcing penalties. Defendant Maruca is the Director of the
 5 state Labor Department (within the ICA) responsible for adjudicating wage claims
 6 brought by Arizona workers whose wages are deducted in violation of either SB 1363 or
 7 SB 1365. Defendant Bennett is the Secretary of State, responsible for compiling and
 8 distributing “a so-called ‘No Trespass Public Notice List’ to all law enforcement agencies
 9 in the state in order to carry out the forced expulsion of any trade unionist whom an
 10 employer asks to be expelled from some property.” FAC ¶ 12.

11 Plaintiffs allege a well-grounded fear of prosecution under SB 1363 because they
 12 “have regularly engaged in union activities on sidewalks and parking lots in front of their
 13 employer’s facilities.” FAC ¶111. Some of those facilities are located alongside state
 14 roads where DPS is called when unionists assemble. Some of those facilities now include
 15 state office buildings where janitors work for a contractor being organized by UFCW.
 16 Plaintiffs also fear future prosecution because they “have regularly engaged in speech
 17 critical of employers and been accused of defamation” FAC ¶117. Plaintiffs allege
 18 fear of prosecution under SB 1365 because provisions of the Act are “impermissibly
 19 vague[,]” FAC ¶47-50, and because “Plaintiff Unions have “spent and absent SB 1365
 20 plan[] to continue to expend union treasury funds for ‘political purposes’ as that term is
 21 defined in SB 1365.” FAC ¶18.

22 Plaintiffs are already suffering injury resulting from passage of SB 1363 because
 23 fear of prosecution under the Act is having a “deterrent effect” on continued criticism of
 24 employers and participation in union activities. FAC ¶¶ 78,117. As a result of the fear of
 25 enforcement of SB 1363, Plaintiffs “suffer inherently-irreparable injuries to their speech
 26 and assembly rights, to union members’ receipt of representation and to union officials’
 27 functioning as labor representatives.” FAC ¶10. Plaintiffs are also already suffering
 28 injury from fear of enforcement of SB 1365 because it “will chill employers from

1 agreeing to continue with payroll check-off systems[,]” (FAC ¶3), and because
 2 compliance with SB 1365 “necessitates immediate and extensive efforts by unions and
 3 employers to avoid devastating impacts on [October 1, 2011].” *Id.* Further facts are set
 4 forth in the declarations filed with Plaintiffs’ motion for preliminary injunction.

5 **III. ARGUMENT**

6 **A. THIS COURT HAS SUBJECT MATTER JURISDICTION TO** 7 **ADJUDICATE PLAINTIFFS’ CLAIMS**

8 Defendants moved to dismiss under Rule 12(b)(1) with no basis, as Plaintiffs’
 9 FAC demonstrates this Court has subject-matter jurisdiction. Defendants’ motion makes
 10 no arguments about jurisdiction besides stating that “Plaintiffs have the burden of
 11 establishing that this Court has jurisdiction.” Plaintiffs readily satisfied this burden.
 12 First, this Court has subject-matter jurisdiction to adjudicate Plaintiffs’ claim because
 13 their FAC alleges that SB 1363 and 1365 are preempted by federal laws. FAC ¶¶ 2, 5.
 14 The Supreme Court has held subject-matter jurisdiction exists under 28 U.S.C. § 1331
 15 when a claim alleges that state law is preempted by federal law. *Shaw v. Delta Air Lines,*
 16 *Inc.*, 463 U.S. 85, 96 n.14 (1983) (“[A] plaintiff who seeks injunctive relief from state
 17 regulation, on the ground that such regulation is pre-empted by a federal statute . . .
 18 presents a federal question which the federal courts have jurisdiction under 28 U.S.C. §
 19 1331. . . .” (citing *Ex parte Young*, 209 U.S. 123, 160–62 (1908))).

20 Second, this Court also has subject-matter jurisdiction to adjudicate Plaintiffs’
 21 claims because their FAC alleges that SB 1363 and 1365 violate U.S. Constitution. When
 22 a complaint “is so drawn as to seek recovery directly under the Constitution . . . the
 23 federal court . . . must entertain the suit.” *Bell v. Hood*, 327 U.S. 678, 681-82 (1946). The
 24 only two exceptions are when a constitutional claim “appears to be immaterial and made
 25 solely for the purpose of obtaining jurisdiction or where such a claim is wholly
 26 insubstantial and frivolous.” *Id.* at 682. Here, Plaintiffs’ FAC explained in detail how SB
 27 1363 and 1365 “facially violate the First and Fourteenth Amendment to the U.S.
 28 Constitution.” FAC ¶ 81. Plaintiffs specifically allege SB 1363 “violate[s] [their]

1 constitutional rights in at least six ways[,]” FAC ¶ 2, and allege SB 1365 violates their
 2 rights under the First Amendment, Due Process Clause, and Fourteenth Amendment.
 3 FAC ¶ 6. Plaintiffs then detail in specific terms why this is so. FAC ¶ 33-127. Their
 4 constitutional claims are not immaterial or frivolous. In their FAC, Plaintiffs also note
 5 this Court has jurisdiction over this action under 42 U.S.C. § 1988, 29 U.S.C. §§ 1332
 6 and 1343, and 29 U.S.C. § 1367. Thus Plaintiffs have in multiple ways satisfied their
 7 burden to prove subject-matter jurisdiction, and this Court cannot dismiss under Rule
 8 12(b)(1).

9 **B. PLAINTIFFS’ CLAIMS ARE CONSTITUTIONALLY RIPE**
 10 **BECAUSE THEY ARE SUFFERING INJURIES IN FACT**
 11 **CAUSED BY THE FEAR OF FUTURE ENFORCEMENT**

12 Defendants allege Plaintiffs’ claims are not yet constitutionally ripe because no
 13 prosecution of these new laws has begun. This defense, however, mischaracterizes
 14 Plaintiffs’ FAC by completely ignoring that the FAC alleges several already-existing
 15 injuries. In their FAC, Plaintiffs allege that they are *already* suffering injuries due to the
 16 well-grounded fear of future prosecution under SB 1363 and SB 1365. These injuries
 17 exist first through self-censorship which is articulated clearly. These allegations satisfy
 18 the injury-in-fact requirement for constitutional ripeness.

19 Defendants’ motion to dismiss mischaracterizes the appropriate standards for
 20 determining constitutional ripeness by citing *Thomas v. Anchorage Equal Rights*
 21 *Comm’n*, 220 F.3d 1134 (9th Cir. 2000) (outlining ripeness requirements for a Free
 22 Exercise Clause violation), rehearing granted and opinion withdrawn, 192 F.3d 1208 (9th
 23 Cir. 1999). Application of that case’s standards are inappropriate here because the
 24 opinion was later withdrawn by the Ninth Circuit and because Plaintiffs’ claims allege
 25 injury to their speech rights. The standards for determining constitutional ripeness when a
 26 Plaintiffs’ ability to speak freely are infringed are different. Although it is still true that
 27 Plaintiffs must show a new law has caused them to suffer an injury in fact, when
 28 challenging statutes which restrict speech, courts have stated such injury in fact can be

1 satisfied by alleging that as a result of fearing future prosecution, a plaintiff has modified
 2 behavior in which he engaged in the past and would like to continue. When a challenged
 3 statute risks chilling the exercise of a plaintiff's First Amendment rights, "the Supreme
 4 Court has dispensed with rigid standing requirements[.]" *Cal. Pro-Life Council, Inc. v.*
 5 *Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003), and recognized self-censorship as "a harm
 6 that can be realized even without an actual prosecution." *Id.* at 1095.¹ Thus courts
 7 encourage pre-enforcement challenges of statutes which violate constitutional rights to
 8 speak.² Pre-enforcement First Amendment challenges are especially appropriate when a
 9 law is targeted directly at a group of plaintiffs, as here. See, e.g., *Virginia v. American*
 10 *Booksellers Ass'n*, 484 U.S. 383, 392-3 (1988) (holding bookstores' facial challenge to
 11 ordinance was ripe where statute means plaintiffs "will have to take significant and costly
 12 compliance measures or risk criminal prosecution.").

13 In the labor context, cognizable injury occurs at a pre-enforcement stage when a
 14 "party is faced with the choice between the disadvantages of complying with an
 15 ordinance or risking the harms that come with noncompliance" *Metropolitan*
 16 *Milwaukee Ass'n of Commerce v. Milwaukee County*, 325 F.3d 879, 883 (7th Cir. 2002).
 17 "As we have noted in the standing context, the increased uncertainty and risk that
 18 accompanies such a change constitutes an injury." *Id.* Plaintiffs plead they are actively
 19

20 ¹ See also *Bland v. Fessler*, 88 F.3d 729, 736-37 (9th Cir. 1996) ("That one should not
 21 have to risk prosecution to challenge a statute is especially true in First Amendment cases
 22"); *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) ("[W]hen the threatened
 23 enforcement effort implicates First Amendment rights, the inquiry tilts dramatically
 24 toward a finding of standing.").

25 ² "In an effort to avoid the chilling effect of sweeping restrictions, the Supreme Court has
 26 endorsed what might be called a 'hold your tongue and challenge now' approach rather
 27 than requiring litigants to speak first and take their chances with the consequences." *Ariz.*
 28 *Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) (finding a plaintiff had
 suffered sufficient injury for standing although plaintiff had neither violated the statute
 nor been subject to any legal penalties, plaintiff was forced to modify its speech and
 behavior to comply with the statute).

suffering an injury in fact because fear of prosecution under SB 1363 by Defendants “is deterring Plaintiffs . . . from engaging in a significant amount of [union] activities” (e.g., picketing and leafleting in front of employers). FAC, ¶ 112. Employers have SB 1363’s early dues termination provision available as a weapon against the unions now made even more potent than it was for the grocers in the last round of negotiations. SB 1365 is causing Plaintiffs to undertake “immediate and extensive efforts . . . to avoid devastating impacts on [the date SB 1365 goes into effect].” FAC, ¶ 3. These efforts include creating a new system for gathering over 21,000 signatures annually, and renegotiating contracts amidst the newly-imposed fear caused by SB 1365 causing employers to more strongly oppose agreeing to deduct dues.

This self-censorship and burden on bargaining are each a “constitutionally sufficient injury,” *Cal. Pro-Life Council*, 328 F.3d at 1107, because based on “an actual and well-founded fear that the challenged statute will be enforced.” *Id.* at 1095. Plaintiffs’ fear of prosecution under both laws is well-founded because “the State has not disavowed any intention of invoking the criminal penalty provision[s] [of the new Acts] against unions,” *Babbitt v. United Farm Workers*, 442 U.S. 289, 302 (1979), and Plaintiffs have assembled (and would like to continue assembling) in ways that “some but not all people would find unreasonable” FAC, ¶ 34. Thus, Plaintiffs are not “without some reason in fearing prosecution for violation of the ban on specified forms of [union activities] . . . [and] the positions of the parties are sufficiently adverse” *Babbitt*, 442 U.S. at 302.

1. Plaintiffs’ fear of future prosecution under SB 1363 is well-founded

Plaintiffs fear prosecution under SB 1363 because an injunction could easily issue at any time. First, this law’s provisions very broad: for example, it “criminalizes any assemblies by labor [performed] in an ‘unreasonable’ manner, without defining this term in any way other than saying it should not be construed to violate federally-protected rights.” FAC ¶2, citing ARS 23-1327(A)(5) and (B). Plaintiffs “have no way of knowing

1 what a judge would consider ‘unreasonable’ in assembling[,]” FAC ¶87, and fear future
 2 prosecution under SB 1363 because have engaged and will engage in activity that “some
 3 but not all people would find unreasonable” FAC ¶85. Every time a union
 4 encourages a consumer boycott of an employer or lobbies against its relicensing
 5 (commonplace conduct protected by the NLRA and First Amendment), this is arguably
 6 destruction of the “intangible property” of the employer (consumer goodwill) and hence a
 7 violation of the new ARS 12-1321(1). UFCW is in current disputes with several
 8 employers against which it would call boycotts but for fear of this statute.

9 The injunction enforcement provisions indicate it is likely that DPS (and hence the
 10 AG) will have to enforce this law against Plaintiffs, even if they currently do not plan to
 11 do so. When an employer is successfully granted an injunction against Plaintiffs under
 12 the authority granted to state courts in SB 1363,³ a violation of such injunction constitutes
 13 the crime of interfering with judicial proceedings. ARS 12-1810(H). Then any peace
 14 officer may arrest a person for violating such injunction based on probable cause
 15 “[w]hether or not a violation occurs in the presence of a peace officer, with or without a
 16 warrant”. ARS 12-1810 (M). Peace officers are immunized from liability for such arrests.
 17 ARS 12-1810(P). Once such an injunction is granted in Arizona, DPS will have little or
 18 no choice but to enforce it when the union’s conduct is next to state roads or at state
 19 buildings, which is commonplace.

22 ³ Section 2 of SB 1363 (codified at ARS 12-1810) in paragraph E expressly dispenses
 23 with the normal requirements for preliminary injunctive relief in ARCP Rule 65(a) that
 24 “[n]o preliminary injunction shall be issued without notice to the adverse party” and then
 25 instead provides lower standards: “If the court finds reasonable evidence of harassment of
 26 the plaintiff by the defendant during the year preceding the filing of the petition or that
 27 good cause exists to believe that great or irreparable harm would result to the plaintiff if
 28 the injunction is not granted before the defendant or the defendant's attorney can be heard
 in opposition and the court finds specific facts attesting to the plaintiff's efforts to give
 notice to the defendant or reasons supporting the plaintiff's claim that notice should not
 be given.” ARS 12-1810(E) dispenses with the requirement of ARCP Rule 65(e) that a
 bond be posted, thereby encouraging pursuing of injunctions without solid grounds.

1 Indeed, on the trespass issue, SB 1363 mandates law enforcement officials remove
 2 unionists without making any further inquiry into the bona fides of an employer's request
 3 for trespass arrest if this employer listed the property with the Secretary of State (ARS
 4 23-1326(F)). This is highly likely of enforcement under common situations where the
 5 NLRA would privilege the Union's activity: current employees of an employer have a
 6 right to be present off-duty on their employer's facilities to engage in union activities;⁴
 7 non-employee union agents have access rights when an employer lets other outsiders use
 8 the property for speech⁵ or when the employer is not the actual owner but merely a lessee
 9 sharing common areas.⁶ Also, most union contracts provide for union representatives to
 10 have access, and the NLRA gives union representatives the right to observe working
 11 conditions inside facilities where they are the designated representative.⁷ But DPS has
 12 been ordered by the Legislature to ignore those reasons for unionists' activities to be
 13 taking place on employer property, and instead just arrest them if an employer requests.

14
 15
 16 ⁴ *Tri-County Medical Center*, 222 NLRB 1089 (1976); *First Healthcare Corp. v.*
 17 *N.L.R.B.*, 344 F.3d 523 (6th Cir. 2003).

18 ⁵ *Lucile Salter Packard Children's Hosp. v. NLRB*, 97 F. 3d 583, 587 (D.C. Cir.
 19 1996)("First, under the 'inaccessibility' exception, an employer violates section 8(a)(1) if
 20 it denies a union access to the employer's property where the union has no other
 21 reasonable means of communicating its message to employees. [cites] Second, under the
 22 'non-discrimination' exception, an employer engages in discrimination as defined by
 section 8(a)(1) if it denies union access to its premises while allowing similar distribution
 or solicitation by nonemployee entities other than the union. [cites]").

23 ⁶ *Wild Oats Markets*, 336 NLRB 179 (2001)(employer violates Act by calling police to
 24 remove union agents from parking lots it did not own but merely leased and shared with
 25 others); *O'Neil's Markets, Inc. d/b/a Food For Less*, 318 NLRB 646 (1995); *Victory*
 26 *Markets*, 322 NLRB 17 (1996); *A&E Food Co. I, Inc.*, 339 NLRB 806 (2003); *UFCW,*
Local 400 v. NLRB (Farm Fresh), 222 F.3d 1030 (D.C. Cir. 2000).

27 ⁷ *NLRB v. Unbelievable, Inc. d/b/a Frontier Hotel*, 71 F.3d 1434, 1438-1439 (9th Cir.
 28 1995); *NLRB v. C.E. Wylie Construction Co.*, 934 F.2d 234, 238-239 (9th Cir. 1991);
NLRB v. Villa Avila, 673 F.2d 281, 283-284 (9th Cir. 1982).

1 The State is also an “employer” under this law (ARS 12-1810R), meaning it too can
 2 pursue civil remedies against UFCW at state buildings where it is organizing janitors.

3 The dispute over SB 1363’s dues termination provision is ripe because the FAC
 4 alleges that members regularly seek to end dues earlier than their one-year contractual
 5 commitment: more than a dozen UFCW members per month on average request early
 6 exit (many are modestly-paid courtesy clerks who find themselves running into financial
 7 troubles). SB 1363 effectively allows them to simply send a letter to their employer to get
 8 out whenever they want.

9 Plaintiffs’ claims regarding injury are not speculative because Plaintiffs
 10 reasonably allege it is impossible that certain provisions of SB 1363 and SB 1365 can
 11 ever be applied in a constitutional manner. For example, there is no way unless the
 12 Supreme Court reverses itself that a state can impose liability for secondary boycotts or
 13 negligent misstatements in labor disputes. Fear of prosecution under the unconstitutional
 14 provisions of SB 1363 is also well-founded because Defendants have not stated they will
 15 not enforce it. Indeed, they have no authority to declare a statute unconstitutional and
 16 decline to enforce it. Nor have they indicated they will abide by a ruling of
 17 unconstitutionality reached against the Sheriff.⁸

18 **2. Plaintiffs’ fear of future prosecution under SB 1365 is even more**
 19 **well-founded**

20 Plaintiffs fear prosecution under SB 1365 because if they did not immediately
 21 change their practice of spending some money on politics without annual signatures from
 22

23 ⁸ The track record of Arizona officials adds reasonableness to Plaintiffs’ fears here of
 24 future unconstitutional prosecution under these laws. See, e.g., *United Steelworkers of*
 25 *America v. Phelps Dodge Corp.* (9th Cir. 1989) 865 F2d 1539, *cert. denied* 493 US 809
 26 (1989) (reversing summary judgment in action alleging employer and state law
 27 enforcement officers conspired to violate civil rights of striking union members).
 28 Moreover, UFCW’s members were met with interference from DPS not long ago when
 they demonstrated along a state road near the Eurofresh plant, and UA’s members at
 mines in the Globe area.

1 members, they would be in violation on October 2nd. Even after signature solicitation, it
 2 would be easy through clerical error for an employee to continue having dues deducted
 3 even though he did not sign a new authorization that year. Also, this law “imposes a
 4 minimum penalty of \$10,000 per inaccurate union statement of maximum [political]
 5 spending, and does not require the violation be intentional or negligent, nor even that the
 6 conduct have been within the local’s control.” FAC ¶75. Fear of enforcement is
 7 amplified by the fact some part of the money deducted from members’ paychecks goes to
 8 the international parent of plaintiff unions. If the international does not accurately
 9 estimate the proportion of members’ dues that it will spend on politics, Plaintiffs would
 10 be “[p]unish[ed] for conduct of their internationals to which the [Plaintiffs] must make
 11 payments, conduct over which the [they] have no control.” FAC ¶74. Plaintiffs do not
 12 have the option of disaffiliating to avoid liability because to “disaffiliate would lead the
 13 [Plaintiffs]’ assets to revert to the International.” FAC ¶37.

14 Also, Plaintiffs reasonably fear punishment under SB 1365 because it is
 15 impermissibly vague in defining terms like “political issue advocacy” and groups
 16 “similar to” political action committees. The FAC at ¶ 47 lists the commonplace union
 17 activities which may or may not be included (for example, communicating with City
 18 officials about working conditions of UFCW’s members working at Phoenix Airport, and
 19 aiding legal defense organizations defending speech). Plaintiffs also reasonably fear
 20 prosecution because SB 1365 does not define whether “payment from an employee’s
 21 paycheck for political purposes” includes “the time spent by salaried union staff who
 22 spend only a small minority of their time on lobbying and political activities.” FAC ¶ 48.
 23 This vagueness must cause Plaintiffs to issue a misleading over-projection of their
 24 political spending, which likely will deter workers from belonging because they do not
 25 want that much spent on politics. Nor do workers enjoy being bothered constantly for
 26 their signatures. This law is currently harming Plaintiffs because it is making employers
 27 and workers more reluctant to participate in these voluntary dues deduction agreements
 28

1 and forcing Plaintiffs to make elaborate administrative arrangements to start collecting
2 over 21,000 signatures per year.

3 **C. PLAINTIFFS' CLAIMS ARE PRUDENTIAL RY RIPE BECAUSE**
4 **THE ISSUES IN THE FAC ARE PURELY LEGAL AND BECAUSE**
5 **PLAINTIFFS WILL SUFFER HARDSHIP IF THIS COURT**
6 **WITHHOLDS CONSIDERATION**

7 To assess prudential ripeness, courts must evaluate "both the fitness of the issues
8 for judicial decision and the hardship to the parties of withholding court consideration."
9 *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Plaintiffs' claims are
10 sufficiently ripe because "when fear of criminal prosecution under an allegedly
11 unconstitutional statute is not imaginary or wholly speculative a plaintiff need not first
12 expose himself to actual arrest or prosecution to be entitled to challenge [the] statute."
13 *Babbitt*, 442 U.S. at 302 (holding a union had standing to sue the State to challenge a new
14 state law because "fear of criminal prosecution under [the] statute is not imaginary or
15 wholly speculative" when Union has "actively engaged in consumer publicity campaigns
16 [prohibited by the statute] in the past and has alleged their intention to continue to engage
17 in boycott activities.").

18 The issues in this case are fit for judicial review because the challenges posed to
19 SB 1363 and SB 1365 by Plaintiffs are facial and purely legal, and the court would not
20 significantly benefit from further factual development.⁹ Indeed, a finding of preemption
21 and unconstitutionality would not be difficult to reach because some parts of SB 1363
22 and SB 1365 are clearly in conflict with past appellate precedent. For example,

23 ⁹ Even if further factual development would be of some benefit to the court, that fact
24 alone does not lead courts to find this type of suit unripe. See *Metropolitan Milwaukee*
25 *Ass'n of Commerce*, 325 F.3d at 882 (holding employer association's action against
26 county for passing ordinance allegedly violative of NLRA and First Amendment ripe
27 before actual enforcement because, although it would be useful to have the benefit of the
28 County's interpretation of the ordinance, the absence of this information does not
preclude judicial review since the complaint raised "almost purely legal issues" that are
"quintessentially fit . . . for present judicial resolution.").

1 redefining defamation of employers to include negligent rather than intentional or
 2 reckless misstatements is nothing short of open defiance of *Linn v. Plant Guard Workers*,
 3 383 US 53, 64-65 (1966) and its progeny.¹⁰

4 The preenforcement nature of this action should not trouble this Court because
 5 Defendants “ha[ve] not suggested that the newly enacted law will not be enforced, and
 6 [the court should] see no reason to assume otherwise.” *American Booksellers*, 484 U.S. at
 7 393. Plaintiffs also satisfy prudential ripeness because delayed judicial determination has
 8 already caused them hardship and will continue to cause hardships. SB 1363 is already
 9 “curtailing such activities” as picketing, boycotting, and union speech. FAC ¶86-87. As
 10 long as SB 1363 is not enjoined, Plaintiffs’ effectiveness at representing their members’
 11 interests in the State will be continually impaired. Delayed adjudication of the
 12 constitutional issues here will cause additional hardship to Plaintiffs because it will
 13 continually injure Plaintiffs’ ability to engage in publicity against employers by placing
 14 Plaintiffs in “the dilemma of incurring the disadvantages of complying [with SB 1363] or
 15 risking penalties for noncompliance.” *Whitney v. Heckler*, 780 F.2d 963, 968-69 n. 6
 16 (11th Cir.1986) (“It is well established that [a case with this type of dilemma] is ripe for
 17 judicial review . . .”), *cert. denied*, 479 U.S. 813.

18
 19 ¹⁰ SB 1363 “expand[s] employer remedies for union violations of an anti-picketing
 20 statute already struck down as unconstitutional by the Arizona Supreme Court.” FAC ¶ 2
 21 See *Baldwin v. Arizona Flame Restaurant, Inc.*, 82 Ariz. 385, 313 P.2d 759 (Ariz. 1957)
 22 (The plain wording of section 56-1310 [also in ARS 23-1322] . . . effectively provides
 23 that under all circumstances, regardless of purpose, a union having less than a majority is
 24 prohibited from all peaceful picketing. Such clearly on its face constitutes a general
 25 prohibition against peaceful picketing in violation of the United States Constitution . . .
 26 .”) The bill also “contains additional punishments for secondary boycotts which the U.S.
 27 Supreme Court has already held that state laws cannot seek to provide. . .” FAC ¶2
 28 (citing *Teamsters v. Morton*, 377 U.S. 252 (1964)) (“state law has been displaced by
 section 303 in private damage actions based on peaceful union secondary activities.”).
 See also *Smart v. Local 702 IBEW*, 562 F.3d 798, 808 (7th Cir. 2009) (Section 303
 “completely preempts state-law claims related to secondary boycott activities described
 in section 158(b)(4); it provides an exclusive federal cause of action for the redress of
 such illegal activity.”).

1 Delayed adjudication of SB 1365's constitutionality poses similarly irreversible
 2 hardship to Plaintiffs. If this Court does not promptly declare SB 1365 unconstitutional,
 3 it "chill[s] employers from agreeing to continue with payroll check-off systems for two
 4 reasons: first, SB 1365 exposes employers to potential risk of large civil penalties if they
 5 fail to terminate dues checkoff or the Union misproject[s] its political spending. Second,
 6 for an employer who does not seek to intrude into internal union matters but is acting in
 7 good faith and does not wish to violate federal labor law, SB 1365 creates uncertainty by
 8 not defining [many of its terms.]" FAC ¶ 3. SB 1365 also causes Plaintiffs hardship
 9 because compliance with it "necessitates immediate and extensive efforts by unions and
 10 employers to avoid devastating impacts." FAC ¶ 3. That is, it requires each union create
 11 a new system for monitoring the annual anniversary date of every member and then doing
 12 mailings, followup calls and visits to members whose anniversary years are about to
 13 expire so as to obtain timely signatures. Beginning October 1st, each union will need
 14 have received in the preceding couple weeks (the exact time period the AG has not
 15 specified) a new signature from each member reaffirming his prior commitment to have
 16 dues deducted for a union's ordinary activity of issue advocacy.

17 Delayed determination of these laws' constitutionality injures Plaintiffs because
 18 threat of enforcement substantially affects Plaintiffs' bargaining power with employers
 19 by (1) supporting the pressure tactic of grocery employers against UFCW in recent
 20 negotiations of urging members to cease paying dues, even if prematurely; and (2)
 21 impairing the effectiveness of important weapons in Plaintiffs' arsenal. By substantially
 22 affecting Plaintiffs' ability to employ picketing as weapons against employers, SB 1363
 23 "permanently and substantially shifts the terms of bargaining . . . even in situations where
 24 the possibility of [picketing] appears remote." *Employers Ass'n v. United Steelworkers*,
 25 32 F.3d 1297, 1299-1300 (8th Cir.1994)(holding action against state for passing statute
 26 making it illegal to hire permanent replacements for strikers was ripe even though unions
 27 had not yet called a strike against any member employer); *Chamber of Commerce v.*
 28 *Reich*, 57 F.3d 1099, 1100 (D.C.Cir.1995) (holding challenge to Executive Order

1 disqualifying any contractor which permanently replaces strikers was ripe because the
 2 mere existence of the order “alters the balance of bargaining power between employers
 3 and employees by . . . depriving them of a significant economic weapon in the collective
 4 bargaining process.”).

5 Delayed consideration of Plaintiffs’ claims also causes hardship because once a
 6 “harassment” injunction issues under SB 1363, Plaintiffs cannot violate it and then
 7 defend themselves against it on the ground that the law permitting said injunction was
 8 unconstitutional. *State v. Chavez*, 123 Ariz. 538, 601 P.2d 301 (Ariz. App. 1979).
 9 Because SB 1363 lowers the bar for such injunctions, it is likelier that an employer will
 10 be able to successfully enjoin Plaintiffs from engaging in protected speech on or near
 11 their properties. When Plaintiffs violate this injunction, they could be convicted of a
 12 crime even though the statute authorizing this conviction is unconstitutional and Plaintiffs
 13 had no opportunity to defend against issuance of the injunction. Also, withheld
 14 consideration of these statutes’ constitutionality until prosecutions occur causes
 15 Plaintiffs’ hardship in that it would likely result in the unique federal issues in Plaintiffs’
 16 FAC having to be presented instead in Arizona criminal courts, which lack this Court’s
 17 level of expertise on preemption and First Amendment issues.

18 **D. DEFENDANTS ARE NOT IMMUNE FROM BEING ENJOINED,**
 19 **AS THEY HAVE A DIRECT ROLE IN ENFORCING THESE**
 20 **LAWS**

21 Defendants are not immune from this suit because Plaintiffs are seeking to enjoin
 22 their enforcement of unconstitutional laws they have a duty to enforce. While a suit for
 23 declaratory relief alone is not outside 11th Amendment immunity (*Will v. Mich. Dep’t of*
 24 *State Police*, 491 U.S. 58, 71 (1989)), this is a suit primarily for injunctive relief rather
 25 than declaratory. The Supreme Court has made clear that suits for injunctive relief against
 26 “a state official in his or her official capacity [are permissible] because official-capacity
 27 actions for prospective relief are not treated as actions against the State.” *Kentucky v.*
 28 *Graham*, 473 U.S. 159, 167 n.14 (1985)(citing *Ex parte Young*, 209 U.S. 123, 155-56

1 (1908). Because Plaintiffs here seek injunctive relief from enforcement of the
2 unconstitutional SB 1363 and SB 1365 and because Defendants have duties to enforce
3 provisions of those laws, suing Defendants in their official capacities is not akin to suing
4 the State. We review each official's role now.

5 **1. Governor Brewer is an appropriate defendant for this suit because she**
6 **is directly responsible for enforcing provisions of SB 1363 and SB 1365.**

7 Governor Brewer is an appropriate defendant for enjoining enforcement of these
8 laws because she is responsible for carrying out the laws enacted by the Legislature. She
9 is responsible for enforcement of SB 1363 through her oversight over DPS which polices
10 labor activities along state roads. She is also responsible for enforcing both new laws
11 through her oversight of the state Department of Labor (DOL). As the State's chief
12 executive, Governor Brewer is also an appropriate defendant because she is an
13 "employer" capable of civil enforcement of SB 1363 under its section 2 (ARS 12-
14 1810(R)). Thus, unless Governor Brewer is a party here, it is possible for her, in her
15 capacity as an employer, to seek civil enforcement of SB 1363 when Plaintiff UFCW
16 undertakes "unreasonable assembly" while organizing GCA Services, a custodial
17 company that it is organizing which has contracts with the State to clean state offices.

18 The likelihood that DPS will seek to enforce SB 1363 against Plaintiffs is further
19 shown by its past conduct: on numerous occasions its officers have come out to
20 picketlines next to state roadways, such as UFCW Local 99's picketline at the Eurofresh
21 plant, and directed changes in those activities. Also, UFCW has demonstrated on state
22 property in the past and hence is likely to do so in the future. For all these reasons,
23 Governor Brewer is an appropriate defendant in this suit for reasons having nothing to do
24 with her signing these bills.
25
26
27
28

1 **2. Attorney General Horne is an appropriate defendant for this suit**
 2 **because he is directly responsible for enforcing provisions of SB 1363**
 3 **and 1365.**

4 Attorney General Horne is an appropriate defendant for this suit because SB 1365
 5 expressly makes his office responsible for enforcing it as well as writing the regulations
 6 thereunder. He argues, however, that he is not an appropriate defendant for all claims
 7 here because he has not been given similar responsibilities as to SB 1363. However, this
 8 has never been a requirement for enjoining a state official in an injunctive suit preventing
 9 enforcement of an unconstitutional statute.

10 The State is included under the definition of “Employer” under Section 2 of SB
 11 1363. Thus union activities on State property could be pursued by the AG. Moreover, the
 12 AG’s office is statutorily tasked with enforcing state laws on state roads which are often
 13 sites of labor activities. Thus, if Plaintiffs have another rally on the edge of a state road
 14 (like those where DPS previously interfered), the Attorney General under SB 1363 would
 15 now have the ability (and arguably the duty) to prosecute them because he found their
 16 assembly “unreasonable”.

17 Even as to disputes arising under SB 1363 on non-state land, the AG is an
 18 appropriate defendant because ARS 41-193(A) says his “department shall: * * * 4.
 19 Exercise supervisory powers over county attorneys of the several counties in matters
 20 pertaining to that office”. Last, when the Secretary of State is faced with issues of
 21 property ownership under the new listing statute, such issues will be resolved by the
 22 AG’s office unless there is some ground for disqualification. ARS 41-192. Hence unless
 23 the AG is a party in this suit and enjoined from enforcing SB 1363 and SB 1365, it would
 24 likely be just a matter of weeks before the AG’s office would seek to violate Plaintiffs’
 25 constitutional rights by enforcing these statutes. The propriety of suing the AG to block
 26 enforcement of an unconstitutional state law was recently noted in *Yes on Prop 200 v.*
 27 *Napolitano*, 215 Ariz. 458, 160 P.3d 1216 (Ariz. App. 2007):

28 In cases in which the constitutionality of a statute is being challenged, the
 Declaratory Judgments Act requires that the Attorney General be served

1 with a copy of the complaint, together with a claim of unconstitutionality,
 2 and be allowed to respond on behalf of the State. A.R.S. § 12-1841
 3 (Supp.2006). Accordingly, Arizona courts have uniformly held that the
 4 Arizona Attorney General is an appropriate party to such cases because the
 5 Attorney General's participation is authorized by the Declaratory Judgments
 6 Act itself. *Ethington v. Wright*, 66 Ariz. 382, 388, 189 P.2d 209, 213
 7 (1948); *City of Tucson v. Woods*, 191 Ariz. 523, 526-27, 959 P.2d 394,
 8 397-98 (App.1997).

9 See *Okpalobi v Foster*, 190 F.3d 337, 343-47 (5th Cir. 1999)(finding *Ex Parte Young*
 10 permitted suit against Governor and AG for injunctive relief against new law despite lack
 11 of direct enforcement threats)(cited favorably in *Culinary Union v. Del Papa*, 200 F.3d
 12 614, 619 (9th Cir. 1999)(no immunity even where AG withdrew threat to enforce)).

13 **3. Secretary of State Bennett is an appropriate defendant for this suit**
 14 **because he is directly responsible for enforcing provisions of SB 1363**

15 Defendant Bennett is an appropriate defendant because he is directly responsible
 16 for enforcing the trespass provisions of SB 1363: he is responsible for “compiling and
 17 distributing ‘so-called ‘No Trespass Public Notice List’ to all law enforcement agencies
 18 in the state in order to carry out the forced expulsion of any trade unionist whom an
 19 employer asks to be expelled from some property.” FAC ¶ 13. The Secretary’s office has
 20 already indicated it will carry out this enactment absent further court order.

21 **4. Director Maruca is an appropriate defendant for this suit because he is**
 22 **likely responsible for enforcing certain provisions of SB 1363 and**
 23 **1365.**

24 DOL Director Maruca is in charge of processing workers’ wage claims when they
 25 have wages deducted in violation of law, including presumably SB 1363 and 1365. No
 26 express reference to his role is needed in such statutes because they are presumed not to
 27 silently repeal existing wage collection laws. See *Gibbs v. O'Malley Lumber Co.*, 868 P.
 28 2d 355, 177 Ariz. 342 (Ariz. App. 1994)(“repeal of statutes by implication is not favored
 in the law. [cites”). Workers filing these wage claims will argue with much justice that
 dues collected in violation of these new laws are illegally-withheld wages. Section 3 of

1 SB 1363 amends an Arizona statute already enforced by DOL barring employers from
 2 withholding any portion of employees' wages except in specified situations. ARS 23-352.
 3 Similarly, workers' argument under SB 1365 will be that full dues deducted after one
 4 year without a new signature are wages to which they are entitled to get DOL help in
 5 recovering under the general wage collection statutes, ARS 23-356 and 213-357.¹¹
 6 Because a material threat of enforcement by DOL exists (in a process the employee can
 7 start without paying a filing fee or hiring a lawyer), Plaintiffs are deterred from spending
 8 money on politics and lobbying, and deterred from enforcing their dues agreements for
 9 fear of spending time and money on DOL proceedings.

10 **E. IF THE COURT HAS ANY DOUBTS AS TO THE ABOVE,**
 11 **IT STILL MUST GRANT LEAVE TO AMEND**

12 Plaintiffs could also add by amendment that UFCW in the last month has
 13 handbilled or joined a workers' delegation in at least a half-dozen properties in Arizona.
 14 These organizing campaigns are still ongoing and have resulted in threats to call law
 15 enforcement and disagreements about credibility of union statements. Plaintiffs thus
 16 reasonably believe that participants in at least one of these campaigns will end up pursued
 17 by Defendants. Plaintiffs could also amend to note that UFCW is now renegotiating
 18 contracts with Ace Parking, Sonoran Desert Museum, and Copper Queen Hospital which
 19 expire by summer's end, and further explain how SB 1363 and 1365 are impairing their
 20 bargaining power in these negotiations: these threaten their ability to use constitutionally-
 21 protected weapons of speech and assembly, while at the same time making it easier for
 22 employers to de-fund unions by pushing employees to refuse to reauthorize political
 23

24 ¹¹ Even without such clear statutory authority, the federal DOL also considers in
 25 enforcing wage laws whether a deduction is lawful outside wage laws: for example, if an
 26 employer illegally deducts taxes which under tax law are the employer's own
 27 responsibility, and the resulting net wages are below the minimum wage, the federal
 28 DOL declares this a violation of federal minimum wage law. 29 USC 531.18. There is
 no reason to suspect the state DOL will not similarly deem illegally-withheld dues to be a
 form of wages which it can pursue administratively under ARS 23-356 and 23-357.

1 spending and/or seek early exit from their dues commitments under SB 1363. By
2 amendment Plaintiffs can list the examples of Arizona employers who have disputed
3 union allegations against them which could now lead to arrest for defaming an employer
4 (or for violating an anti-defamation injunction).

5 **V. CONCLUSION**

6 The State Defendants' motion to dismiss must be denied.

7
8 Dated: July 6, 2011

Respectfully submitted,

9 DAVIS COWELL & BOWE LLP

10 By: /s/ Andrew J. Kahn

11 *Attorneys for Plaintiffs UFCW Local 99,*
12 *McLaughlin and Colbath*

13 WARD KEENAN & BARRETT, PC

14 By: /s/ Gerald Barrett

15 *Attorneys for Plaintiffs UA Local 469,*
16 *McNally & Rothans*